Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-16–02 OF 2015(W)
ZULKEFLI CJ (MALAYA), SURIYADI , ZAINUN ALI, RAMLY ALI AND BALIA YUSOF FCJJ
14 JULY 2016

Companies and Corporations — Winding up — Undue preference — Whether doctrine of undue preference applied to relationship of vendor and purchaser — Whether SPAs made in bad faith and without valuable consideration — Whether impugned SPAs entered into within two years prior to commencement of winding up proceedings against first respondent — Whether impugned SPAs gave appellant preference over other creditors and therefore absolutely void against the liquidators — Whether directors and shareholders of first respondent and directors and shareholders of appellant were related — Whether s 293 of the Companies Act 1965 ('the Act') should be read with s 52 of the Bankruptcy Act 1967 in present circumstances — Whether impugned SPAs void — Estoppel — Estoppel by conduct — Whether first respondent estopped from relying on s 293 of the Act — Whether equitable principle could operate to defeat clear statutory provisions of law — Unjust enrichment — Whether proven

Evidence — Witnesses — Failure to call — Whether adverse inference should be drawn against appellant — Whether respondents' evidence unchallenged by failure

Gallant Acres Sdn Bhd ('the first respondent'), a licensed housing developer, entered into a Joint Venture Agreement with Kepong Development Sdn Bhd ('the second respondent'), the owner of a piece of land in Kuala Lumpur ('the land'), to develop the land under two phases ('the project'). During the first phase of the project, the first respondent became commercially insolvent and was wound up by an order of court and a liquidator was duly appointed. With the winding up of the first respondent, the first phase of the project was abandoned and the second phase never took off the ground. Thereafter, both respondents entered into a settlement agreement ('SA') to salvage the project. The SA provided, inter alia, that the second respondent would develop the land at its own expense subject to the requisite sanction being obtained by the liquidator from the court to satisfactorily resolve and settle all claims made by prior purchasers of the apartments and shop lots in the first phase of the project. It was also agreed in the SA that upon completion of the low cost apartments and shop lots in Phase 1 of the project, the liquidator would pay all sums received from the purchasers to the second respondent after deducting all the fees and expenses of the liquidators. Silver Corridor Sdn Bhd ('the

appellant') claimed to be the purchaser of 12 units of shop lots that had been constructed or were to be constructed on the first phase of the project. In support of its claim, the appellant produced 12 sale and purchase agreements ('SPAs') for all the 12 shop lots it intended to purchase and official receipts from the first respondent acknowledging full payment for each of the 12 shop lots. The liquidator upon perusal of the first respondent's records found no evidence to show that the payment was paid into any of the first respondent's account. Upon further inquiries, the liquidator also discovered that the former directors of the first respondent and the directors of the appellant at the material time were immediate relatives within the same family and they were in effective control of both the first respondent and the appellant. The liquidator on behalf of the first respondent and the second respondent filed an action against the appellant. It was the respondents' case that the transfer of the shop lots by virtue of the 12 SPAs (the impugned SPAs) was not made in good faith or for valuable consideration and that in the circumstance, they were absolutely void in view of the fact that the impugned SPAs were entered into within two years prior to the commencement of winding up proceedings against the first respondent. The time gap between the date of the execution of the 12 impugned SPAs, 19 September 2006, and the commencement of the winding up proceedings,18 December 2007, was approximately 15 months. Therefore, the respondents submitted that the impugned SPAs fell within the two year period of the commencement of the winding up proceedings and were void. Further, it was the respondents' case that the execution of the impugned SPAs was tainted by the conflicted interest of related personages behind the appellant and the directors of the first respondent at the time the impugned SPAs entered into. The appellant on the other hand contended that all the impugned SPAs were validly entered into between the appellant and the respondents as the vendor and land owner. The High Court judge found that the impugned SPAs were deemed to have given the appellant preference over other creditors and therefore were absolutely void against the liquidators. As such, the High Court judge held that the respondents had managed to establish a case under s 293 of the Companies Act 1965 ('the Act') read together with s 52 of the Bankruptcy Act 1967 ('the BA'), and that the impugned SPAs were therefore void. The respondents appealed to the Court of Appeal. The Court of Appeal found no error or misdirection by the trial judge in making an inference that there existed an underlying deceitful intent behind the execution of the impugned SPAs. Thus, the Court of Appeal dismissed the appellant's appeal and affirmed the decision of the High Court. The appellant then obtained the leave of the court to proceed with the present appeal, which centered around three statutory provisions of law, namely s 293 of the Act, ss 52 and 53 of the BA. In this appeal, the appellant argued that s 293 of the Act had to be read with s 53 of the BA and if so since there had been a lapse of more than six months between the dates when the 12 SPAs were entered into and the first respondent was wound up, the transactions were not caught by the prohibition under s 53 of the BA and the action taken by the liquidator of the first respondent should fail.

Held, dismissing the appeal with costs:

(1) Section 293 of the Act does not stand alone. It should be read together with the relevant laws of bankruptcy, particularly s 52 of the BA and/or s 53 of the BA. So far as relevant to the facts of the present case, s 293 of the Act read together with s 52 of the BA had the effect that any transfer or conveyance of the property by the first respondent (comprising of the impugned SPAs) in favour of the appellant as a purchaser should, if a winding up petition against the first respondent had been commenced within two years after the date of the transfer or conveyance, be absolutely void. In the present case, there was ample evidence adduced during the trial to support the findings that the impugned SPAs had not been entered into bona fide, especially as the appellant had failed to establish that it had paid valuable consideration for the same. As such, the respondents were correct in relying on s 52 of the BA, which was the material provision to be invoked by the respondents to be read with s 293 of the Act. In the circumstances, the Court of Appeal was correct in finding that the respondents had discharged their burden of proof to establish a case under s 293 of the Act read together with s 52 of the BA, and that the impugned SPAs were therefore void against the liquidator of the first respondent unless the transfer of the 12 shop lots was made in good faith and for valuable consideration. In the present case there was compelling evidence that the SPA transactions were not done at arm's length to qualify as a bona fide arm's length commercial sale between a vendor and a purchaser. Further, the directors and shareholders of the first respondent and the directors and shareholders of the appellant were all within the same family and related to each other. In short, the appellant was not a purchaser in good faith (see paras 30, 32 & 36–40).

(2) At the trial the appellant only called its company secretary ('DW1'), who had no personal knowledge pertaining to the transaction of the 12 shop lots, to testify. In effect there was practically no evidence whatsoever led by the appellant to rebut the overwhelming evidence of the respondents. The appellant provided no reason as to why it did not care to call its witnesses and to adduce evidence, therefore leaving the court to draw an adverse inference against the appellant. In such circumstances it was clear that the courts below were correct in finding that there was practically no evidence whatsoever led by the appellant to rebut the overwhelming evidence of the respondents and finding in favour of the respondents (see paras 41–45).

(3) Section 53 of the BA would only be relevant and applicable in a situation where the bankrupt (or company) was already insolvent and the challenge was to invalidate certain conveyance or disposal or payment effected to some selected or preferred unsecured creditors in preference to others. In short, s 53 of the BA should be construed in its proper context,

which was to invalidate attempts at 'fraudulent preference'. However, s 53 of the BA would not apply to the facts of the present case since the person in whose favour the transaction was effected ie the appellant in the present case stood in relation of creditor to the company or the first respondent. There was also no evidence to show that the first respondent was insolvent at the time when the transaction took place. As correctly ruled by the Court of Appeal, the real issue in this case was that the impugned SPAs had not been entered in good faith and had not been supported by valuable consideration. Therefore it was obvious that s 52 of the BA (not s 53 of the BA) was the material provision to be invoked to be read with s 293 of the Act (see paras 48–56).

(4) The appellant's submission that that the first respondent by accepting the appellant's payment of the full purchase price for all the 12 shop lots was estopped from relying on s 293 of the Act as to prevent the appellant from receiving the properties which it had paid for, had no merit. The respondents' claim was based on statutory provisions, namely s 293 of the Act read together with s 52 of the BA. These statutory provisions were clear and unambiguous. Estoppel, being an equitable principle could not operate to defeat clear statutory provisions of law (see paras 57–59).

(5) There was no evidence adduced by the appellant that it had paid the purchase price for the shop lots. There was also no evidence to show that the purchase price was received by the first plaintiff and paid into the statutory account as required under s 7 of the Housing Developers (Control and Licensing) Act 1966. Therefore, the issue of unjust enrichment as raised by the appellant should fall (see para 60).

[Bahasa Malaysia summary

Gallant Acres Sdn Bhd ('responden pertama'), sebuah syarikat pemaju perumahan berlesen, membuat suatu perjanjian usahasama dengan Kepong Development Sdn Bhd ('responden kedua'), pemilik sebidang tanah di Kuala Lumpur ('tanah tersebut'), untuk membangunkan tanah tersebut dalam dua fasa ('projek tersebut'). Semasa fasa pertama projek tersebut, responden pertama menjadi tidak solven dan telah digulung melalui suatu perintah mahkamah dan seorang likuidator telah dilantik. Apabila responden pertama digulung, fasa pertama projek tersebut terbengkalai dan fasa kedua pula tidak dapat diteruskan. Kemudian, kedua-dua responden membuat suatu perjanjian penyelesaian bagi menyelamatkan projek tersebut. Perjanjian penyelesaian tersebut menyatakan, antara lain, bahawa responden kedua akan membangunkan tanah tersebut atas tanggungan sendiri tertakluk kepada keperluan kebenaran yang diperoleh oleh likuidator daripada mahkamah untuk membuat ketetapan yang memuaskan dan menyelesaikan semua tuntutan yang dibuat oleh pembeli pangsapuri dan lot kedai terdahulu dalam fasa pertama projek tersebut. Perkara yang turut dipersetujui dalam perjanjian penyelesaian tersebut ialah apabila pangsapuri kos rendah dan lot kedai dalam

fasa pertama projek tersebut disiapkan, pihak likuidator akan membayar semua bayaran yang diterima daripada pembeli kepada responden kedua setelah menolak semua fi dan perbelanjaan likuidator. Silver Corridor Sdn Bhd ('perayu') menyatakan bahawa mereka merupakan pembeli 12 unit lot kedai yang telah dibina atau akan dibina dalam fasa pertama projek tersebut. Dalam menyokong tuntutannya, perayu telah mengemukakan 12 perjanjian jual beli bagi kesemua 12 lot kedai yang dihasratkan untuk dibeli dan resit rasmi daripada responden pertama yang mengakui pembayaran penuh bagi setiap 12 lot kedai tersebut. Setelah pihak likuidator meneliti rekod pihak responden pertama, mereka mendapati tiada keterangan yang menunjukkan bahawa bayaran telah dibuat ke dalam mana-mana akaun bank responden pertama. Berdasarkan siasatan selanjutnya, pihak likuidator mendapati bahawa bekas pengarah pihak responden pertama dan pengarah pihak perayu, pada masa yang material itu, merupakan keluarga terdekat dari kalangan keluarga yang sama dan mereka mempunyai kawalan penuh ke atas kedua-dua responden pertama dan perayu. Pihak likuidator telah memfailkan tindakan terhadap perayu bagi pihak responden pertama. Menurut responden, pemindahan hak milik lot kedai menurut 12 perjanjian jual beli itu (perjanjian jual beli yang dipersoalkan) tidak dibuat dengan suci hati atau dengan balasan berharga dan dalam keadaan sedemikian, perjanjian itu tidak sah secara mutlak berdasarkan kepada fakta bahawa perjanjian jual beli yang dipersoalkan itu dibuat dalam tempoh dua tahun sebelum prosiding penggulungan dimulakan terhadap responden pertama. Jarak masa antara tarikh 12 perjanjian jual beli yang dipersoalkan itu disempurnakan, 19 September 2006, dan permulaan prosiding penggulungan, 18 Disember 2007, adalah lebih kurang selama 15 bulan. Oleh yang demikian, pihak responden menyatakan bahawa perjanjian jual beli yang dipersoalkan itu termasuk dalam tempoh dua tahun bagi permulaan prosiding penggulungan dan tidak sah. Selanjutnya, responden menyatakan bahawa penyempurnaan perjanjian jual beli yang dipersoalkan itu telah dicemari dengan percanggahan kepentingan oleh kumpulan yang mempunyai hubungan dengan perayu dan pengarah pihak responden pertama semasa perjanjian jual beli yang dipersoalkan itu dibuat. Perayu pula sebaliknya menyatakan bahawa kesemua perjanjian jual beli yang dipersoalkan itu telah dibuat secara sah antara perayu dengan responden selaku penjual dan pemilik tanah. Hakim Mahkamah Tinggi mendapati bahawa perjanjian jual beli yang dipersoalkan itu disifatkan telah memberikan keutamaan kepada perayu mengatasi pemiutang yang lain dan oleh itu, perjanjian itu menjadi tidak sah terhadap likuidator. Justeru, hakim Mahkamah Tinggi memutuskan bahawa responden telah berjaya membuktikan suatu kes di bawah s 293 Akta Syarikat 1965 ('Akta') dibaca bersama dengan s 52 Akta Kebankrapan 1967 ('AK'), dan oleh yang demikian perjanjian jual beli yang dipersoalkan itu adalah tidak sah. Pihak responden kemudiannya merayu kepada Mahkamah Rayuan. Mahkamah Rayuan mendapati tiada kekhilafan atau tersalah arah oleh hakim bicara dalam membuat inferens bahawa terdapat niat untuk menipu yang tersembunyi di sebalik penyempurnaan perjanjian jual beli yang dipersoalkan

itu. Oleh yang demikian, Mahkamah Rayuan telah mengetepikan rayuan perayu dan mengesahkan keputusan Mahkamah Tinggi. Perayu kemudiannya telah mendapatkan izin mahkamah untuk meneruskan rayuan sedia ada, yang tertumpu kepada tiga peruntukan statutori iaitu s 293 Akta, ss 52 dan 53 AK. Dalam rayuan ini, perayu menghujahkan bahawa s 293 Akta mestilah dibaca bersama dengan s 53 AK dan jika sedemikian, memandangkan terdapat suatu keluputan untuk tempoh melebihi enam bulan dari tarikh 12 perjanjian jual beli itu dibuat dan responden pertama digulungkan, maka larangan di bawah s 53 AK tidak terpakai bagi transaksi itu dan tindakan yang diambil oleh pihak likuidator bagi responden pertama hendaklah gagal.

Diputuskan, rayuan perayu ditolak dengan kos.

(1) Seksyen 293 Akta tidak berdiri dengan sendiri. Ia hendaklah dibaca bersama dengan undang-undang kebrankapan yang relevan, khususnya s 52 BA dan/atau s 53 AK. Setakat yang relevan kepada fakta kes ini, s 293 Akta dibaca bersama dengan s 52 AK mempunyai kesan bahawa apa-apa pemindahan hak milik atau pemindahhakkan harta oleh responden pertama (termasuklah perjanjian jual beli yang dipersoalkan) yang memihak kepada perayu sebagaimana sepatutnya seorang pembeli hendaklah menjadi tidak sah jika suatu petisyen penggulungan terhadap responden pertama dimulakan dalam tempoh dua tahun selepas tarikh pemindahan hak milik atau pemindahhakan itu. Dalam kes ini, terdapat keterangan yang mencukupi yang dikemukakan semasa perbicaraan bagi menyokong dapatan bahawa perjanjian sewa beli yang dipersoalkan itu telah tidak dibuat secara bona fide, terutamanya apabila perayu telah gagal menunjukkan bahawa ia telah membayar balasan berharga bagi perjanjian itu. Justeru, responden adalah betul apabila bergantung kepada s 52 AK, yang merupakan peruntukan material yang digunakan oleh responden, dan dibaca bersama dengan s 293 Akta. Dalam hal ini, Mahkamah Rayuan adalah betul apabila mendapati bahawa responden telah melepaskan beban pembuktian mereka untuk membuktikan kes di bawah s 293 Akta dibaca bersama dengan seksyen dak sah terhadap likuidator bagi responden pertama melainkan pemindahan hak milik 12 lot kedai itu dibuat secara suci hati dan untuk balasan berharga. Dalam kes ini, terdapat keterangan yang begitu mendesak bahawa transaksi perjanjian jual beli itu tidak dilakukan secara tulus untuk layak dikatakan sebagai satu penjualan komersial yang tulus antara seorang penjual dengan seorang pembeli. Tambahan lagi, pengarah dan pemegang saham bagi responden pertama dan pengarah dan pemegang saham bagi perayu kesemuanya dari kalangan keluarga yang sama dan mempunyai hubungan persaudaraan antara satu sama lain. Ringkasnya, perayu bukanlah seorang pembeli yang suci hati (lihat perenggan 30, 32 & 36–40).

(2) Semasa perbicaraan, perayu hanya memanggil setiausaha syarikatnya

(DW1), yang tidak mempunyai pengetahuan pun mengenai transaksi berhubung dengan 12 lot kedai itu, untuk memberi keterangan. Malah, tiada satu pun keterangan yang dikemukakan oleh perayu untuk mematahkan keterangan responden yang sangat ketara. Perayu tidak memberikan sebab mengapa ia tidak peduli untuk memanggil saksi-saksinya dan untuk mengemukakan keterangan, lantas mendorong mahkamah untuk membuat inferens yang menentang terhadap perayu. Dalam keadaan sedemikian, jelas menunjukkan bahawa mahkamah bawahan adalah betul dalam membuat dapatan bahawa tiada satu pun keterangan yang dikemukakan oleh perayu untuk mematahkan keterangan pihak responden yang sangat jelas dan membuat dapatan yang memihak kepada responden (lihat perenggan 41–45).

(3) Seksyen 53 AK hanya relevan dan terpakai bagi suatu keadaan apabila seorang bankrap (atau syarikat) telah menjadi tidak solven dan cabarannya adalah untuk menidaksahkan pemindahhakan atau pelupusan atau pembayaran tertentu yang dibuat kepada pemiutang tidak bercagar yang terpilih atau diutamakan mengatasi pemiutang yang lain. Ringkasnya, s 53 AK hendaklah ditafsirkan dalam konteks yang sepatutnya, iaitu untuk menidaksahkan percubaan untuk melakukan keutamaan fraud. Walau bagaimanapun, s 53 AK tidak terpakai kepada fakta kes ini memandangkan orang yang baginya transaksi itu dibuat, iaitu perayu dalam kes ini, mempunyai hubungan persaudaraan dengan pemiutang syarikat atau responden pertama. Tidak juga terdapat keterangan yang menunjukkan bahawa responden pertama telah menjadi tidak solven pada ketika transaksi itu berlaku. Sebagaimana yang diputuskan dengan betul oleh Mahkamah Rayuan, isu sebenar dalam kes ini ialah perjanjian jual beli yang dipersoalkan itu telah dibuat secara tidak suci hati dan tidak disokong dengan balasan berharga. Oleh yang demikian, adalah sangat jelas bahawa s 52 AK (bukan s 53 AK) ialah peruntukan yang material untuk digunakan dan dibaca bersama dengan s 293 Akta (lihat perenggan 48–56).

(4) Hujahan perayu bahawa responden pertama dengan menerima harga bayaran penuh daripada perayu bagi kesemua 12 lot kedai diestop daripada bergantung ke atas s 293 Akta sebagai menghalang perayu daripada menerima harta yang mana ia telah bayar tidak bermerit. Tuntutan responden adalah berdasarkan kepada peruntukan statutori iaitu s 293 Akta dibaca bersama dengan s 52 AK. Peruntukan statutori ini adalah jelas dan tidak samar. Estopel yang merupakan suatu prinsip ekuiti tidak boleh digunakan untuk menggagalkan suatu peruntukan undang-undang statutori yang jelas (lihat perenggan 57–59).

(5) Tiada keterangan dikemukakan oleh perayu untuk menunjukkan bahawa ia telah membayar harga belian bagi rumah kedai itu. Tidak juga terdapat keterangan untuk menunjukkan bahawa harga belian itu telah

diterima oleh plaintif pertama dan dimasukkan ke dalam akaun statutori sebagaimana yang dikehendaki di bawah s 7 Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966. Oleh yang demikian, isu pengayaan secara tidak adil yang dibangkitkan oleh perayu hendaklah ditolak (lihat perenggan 60).]

Notes

For cases on failure to call witness, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 3504–3525.

For cases on undue preference, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 2030–2035.

Cases referred to

A Debtor, ex parte the official receiver, In re [1965] 1 WLR 1498, Ch D (refd)

Anson Cycle & Motor Works, ex parte the official assignee, Re [1960] MLJ 171, CA (refd)

Barton v Official Receiver (1986) 161 CLR 75, HC (refd)

Ferrier and another v Civil Aviation Authority (1994) 127 ALR 472, FC (refd)

Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33; [1991] 1 CLJ 9, SC (refd)

Hance v Harding (1888) 20 QBD 732, CA (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)

Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] 30 MLJ 49, PC (refd)

Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449, SC (refd)

Maritime Electric Co Ltd v General Dairies Ltd [1937] AC 610, PC (refd)

Mackintosh v Pogose [1895] 1 Ch 505, Ch D (refd)

Official Assignee v Ngu Ung Yong [1988] 2 MLJ 264 (refd)

Official Assignee of the Estate of Cheah Soo Tuan v Khoo Saw Cheow [1931] 2 MC 126; [1931] AC 67, PC (refd)

Pickup v The Thames And Mersey Marine Insurance Company, Limited (1878) 3 QBD 594, CA (refd)

Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (in liquidation) [1998] 4 MLJ 569; [1998] 4 CLJ 557, FC (refd)

Southend-on-Sea Corpn v Hodgson (Wickford) Ltd [1962] 1 QB 416, QBD (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2) [2010] 2 MLJ 181; [2010] 1 CLJ 381, FC (refd)

Tee Siew Kai (as the liquidator for Kumpulan Kerjaya Bhd (the receiver and manager appointed)) (in liquidation) v Affin Bank (formerly known as BSN Commercial Bank (M) Bhd) & Anor [2011] 4 MLJ 491; [2011] 1 LNS 18, HC (refd)

Union Bank v Wales [1991] 116 L Ed 2d 514, SC (refd)

United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352b, HC (refd)
Wakelin v London and South-Western Railway Company (1887) 51 JP 404, HL (refd)
Wasakah Singh v Bachan Singh [1931] 1 MC 125 (refd)
Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors [2012] 5 MLJ 319, CA (refd)

Legislation referred to

Bankruptcy Act 1967 ss 52, 52(3), 53, 53(1)
Companies Act 1965 s 293
Housing Developers (Control and Licensing) Act 1966 ss 7, 24
Housing Developers (Housing Development Account) Regulations 1991 r 4

Appeal from: Civil Appeal No W-02(NCC)(W)-2303–10 of 2013 (Court of Appeal, Putrajaya)

Gopal Sri Ram (M Manoharan, CK Lim and David Yii with him) (M Manoharan & Co) for the appellant.
M Pathmanathan (Amrit Pal Singh and RK Sharma with him) (Amrit & Co) for the respondents.

Ramly Ali FCJ (delivering judgment of the court):

THE APPEAL

[1] The appellant in the present appeal before us, Silver Corridor Sdn Bhd was the defendant at the High Court. The first respondent, Gallant Acres Sdn Bhd (under liquidation and acting by the liquidator) was the first plaintiff, while the second respondent, Kepong Development Sdn Bhd, was the second plaintiff there.

[2] Before the High Court, the plaintiffs (respondents herein) sought for declaratory orders that various sale and purchase agreements in respect of 12 shop lots constructed or to be constructed by the first plaintiff, as the developer be declared invalid, void and of no effect pursuant to s 293 of the Companies Act 1965 ('the CA') read together with ss 52 and/or 53 of the Bankruptcy Act 1967 ('the BA') and that the shop lots were still vested with the liquidator of the first plaintiff.

[3] The present appeal is against the decision of the Court of Appeal given on 31 March 2014 affirming the decision of the High Court dated 20 September 2013 granting declarations as prayed for by the plaintiffs. In this judgment the respective parties shall be referred to as they were in the High Court.

FACTUAL BACKGROUND

[4] The first plaintiff was a licensed housing developer under the Housing Developers (Control and Licensing) Act 1966. The second plaintiff was the registered owners of a piece of land originally held under HS(D) 79275, PT No 564, Mukim Batu, Kuala Lumpur W/P, which was later subdivided into:

(a) Geran No 47407 Lot No 58072; and

(b) Geran No 47408 Lot No 58073.

[5] The second plaintiff decided to construct a low cost housing scheme on the land and to relocate as well as to resettle squatters found on the land. For that purpose, a joint venture agreement dated 30 December 1999 ('the JVA') between the first and second plaintiffs were entered into whereby the first plaintiff agreed to develop the land under two phases — Lot No 58072 for first phase and Lot No 58073 for second phase respectively. Phase 1 consisted of three blocks of 16 stories each comprising a total of 540 units of low cost apartments and 12 units of shop lots. Phase 2 would have 396 medium cost apartments and 12 units of shop lots. The first plaintiff developed the first phase sometime between late 2000 to early 2001, but the development was abandoned when the first plaintiff was wound up.

[6] The first plaintiff, being commercially insolvent, was wound up by an order of court on 5 March 2008, on a winding up petition filed by one South Engineers Sdn Bhd. The winding up petition was filed on 18 December 2007. Initially the Director General of Insolvency ('DGI') was appointed liquidator of the first plaintiff. Later, by an order of court dated 7 April 2009 one Subramanian a/l AV Sanker of Hals Associate ('PW1') was appointed liquidator in place of the DGI. The present action was brought by the said liquidator in the name and on behalf of the first plaintiff.

[7] With the winding up of the first plaintiff, the development of the first phase was abandoned and the second phase never took off the ground.

[8] During verification exercise conducted by the liquidator, to verify the purchasers of units of the development, the defendant claimed to be the purchaser of all the 12 units of shop lots constructed or to be constructed on the first phase. In support of its claim, the defendant produced 12 sale and purchase agreements ('SPAs'), all respectively dated 19 September 2006 for all 12 shop lots. The defendant claimed that it had paid to the first plaintiff in full the purchase price of RM120,000 for each of the 12 shop lots, totaling RM1,440,000 by way of 12 Maybank cheques all dated 13 October 2006 with consecutive serial numbers. The defendant also produced what purports to be the first plaintiff's official receipts acknowledging such payments for each of

A the 12 shop lots respectively, all dated 13 October 2006.

[9] The liquidator conducted his inquiries and examination of the records of the first plaintiff. However, he could not find any evidence be it in the form of document or otherwise to show that the payments were in fact received by the B first plaintiff. Upon further inquiries, the plaintiffs discovered that the former directors, of the first plaintiff and the directors of the defendant at the material time were immediate relatives within the same family and they were in effective control of both the first plaintiff and the defendant.

C

[10] The plaintiffs commenced proceedings against the defendant at the Kuala Lumpur High Court on 25 July 2012. Prior to that, both plaintiffs entered into a settlement agreement ('SA') dated 5 April 2011 to salvage the development project on the land whereby it was agreed that the second plaintiff D would develop the land in question at its own expense subject to the requisite sanction being obtained by the liquidator from the court to satisfactorily resolve and settle all claims made by prior purchasers of the apartments and shop lots in the project. It was also agreed in the SA that upon completion of the low cost apartments and the Phase 1 shop lots, the liquidator shall pay all E sums received from the purchasers to the second plaintiff after deducting all the fees and expenses of the liquidators which is capped at RM450,000.

[11] On 24 April 2004 (prior to the winding up order) the Kuala Lumpur High Court in an earlier proceedings between the first plaintiff and the second F plaintiff vide Origination Summons No D8-24–153 of 2003 made an order against the first plaintiff, ordering the first plaintiff to pay the second plaintiff a sum of RM1m with interest accruing at 10%pa from 27 March 2003 until full and final settlement (the first plaintiff's appeal to the Court of Appeal was dismissed on 26 September 2006 and its application for leave to appeal to the G Federal Court was also dismissed on 16 April 2007).

[12] On 29 February 2008 (also prior to the winding up order) the second plaintiff had obtained another judgment (by way of a summary judgment) on its counterclaim against the first plaintiff vide Kuala Lumpur High Court Suit H No S6–22–682 of 2007 for a sum of RM3,523,500. In short, prior to the making of the winding up order against the first plaintiff on 5 March 2008, the second plaintiff was a judgment creditor in respect of the two judgments obtained from the Kuala Lumpur High Court and was an interested party in the assets of the first plaintiff.

I

AT THE HIGH COURT

[13] At the High Court, the plaintiffs' case rest on their contentions that the sale and purchase of the 12 shop lots appeared to be suspicious and mala fide

with clear intention of depriving the first plaintiff of its assets at the material time. The first plaintiff was wound up by order of court on 3 May 2008 on a winding up petition presented on 18 December 2007 in the Kuala Lumpur High Court Companies Winding Up No D7–28–887 of 2007. The date 18 December 2007 is the date of the presentation of the winding up petition and thus the commencement of the winding up proceedings against the first plaintiff. The 12 shop lots were allegedly sold simultaneously to the defendant by the signing of the 12 SPAs all dated 19 September 2006. The time gap between the date (19 September 2006) and the commencement of the winding up proceedings (18 December 2007) is approximately 15 months. Therefore, the plaintiffs submitted that the 12 SPAs fall within the two years period of the commencement of the winding up proceedings. Thus the plaintiffs concluded that based on the facts and evidence, the defendant was not a purchaser in good faith; and s 293 of the CA read together with s 52 of the BA pertaining to undue preference is therefore applicable in this case.

[14] The defendant on the other hand contended that all the 12 SPAs were validly entered into between the defendant and the plaintiffs as the vendor and land owner; and the defendant was at all material times a bona fide purchaser that had provided valuable consideration by paying the full purchase price to the plaintiffs. It was also contended by the defendant that based on the facts and evidence of the case, the liquidator brought the action solely for his own benefit (in securing a sum of RM450,000 as his fees and expenses) and the interest of the second plaintiff only, but not for the benefit of the general creditors. It was further submitted by the defendant that it would be inequitable and unjust for the second plaintiff to challenge the validity of the 12 SPAs because it was a willing and consenting party in signing the 12 SPAs. Therefore, the defendant concluded that s 293 of the CA and ss 52 or 53 of the BA are not applicable because the 12 SPAs were all validly executed by the parties.

[15] The learned High Court judge allowed the plaintiffs' claims. In doing so, Her Ladyship came to the following findings — that the 12 SPAs were all entered and executed on the same date ie 19 September 2006; that the signatories representing the defendant and the first plaintiff were all related to each other; that the Lee family was involved in both the first plaintiff as well as the defendant as shareholders and directors at the material time in 2006; that the 12 shop lots were only 45% completed at the material time when the 12 SPAs were executed; that the transactions were clearly not made in the course of a normal, genuine commercial transaction and not in good faith.

[16] The learned judge had analysed the provisions of s 293 of the CA, and ss 52 and 53 of the BA. Her Ladyship concluded that based on the facts and evidence in the case, the 12 SPAs were deemed to have given the defendant

preference over other creditors and therefore were absolutely void against the liquidators. Based on the evidence adduced during trial, the learned judge was satisfied that the plaintiffs have proven their claim against the defendant on a balance of probabilities.

AT THE COURT OF APPEAL

[17] At the Court of Appeal, the parties submitted and argued at great length on the application of s 293 of the CA and ss 52 and 53 of the BA, to the facts of the present case.

[18] The defendant's argument is that s 293 of the CA has to be read with s 53 of the BA because the alleged transactions were tantamount to an undue preference. Section 53 declares that such transactions shall be deemed fraudulent and void as against the liquidator/official assignee if they were made within six months prior to the presentation of a winding up petition against the company in question (or a bankruptcy petition against an individual). The defendant submitted that since there had been a lapse of more than six months between the date of the SPAs (19 September 2006) and the presentation of the winding up petition against the first plaintiff (18 December 2007), the prohibition under s 53(1) does not apply; the sale and purchase of the 12 shop lots were valid and therefore the liquidator's action against the defendant must fall.

[19] The plaintiff on the other hand responded that s 293 of the CA must be read with s 52 of the BA (but not s 53) to determine the validity of the impugned 12 SPAs and the effect of the sale and purchase transactions in question. The plaintiffs contended that the sale and purchase transactions of the shop lots by way of the impugned 12 SPAs which fall under the definition of 'settlement' under s 52(3) of the BA, being 'conveyance or transfer of property' were not made in good faith nor for valuable considerations; and therefore they were absolutely void as they were entered into within a period of two years prior to commencement of the winding up petition against the first plaintiff.

[20] After hearing submissions by the parties the Court of Appeal dismissed the defendant's appeal and affirmed the decision of the High Court. In coming to that decision, the Court of Appeal held, inter alia, that the 12 impugned SPAs had not been entered in good faith nor were they supported by valuable considerations passing from the defendant to the first plaintiff; and therefore s 52 of the BA is more relevant and material to be invoked, read together with s 293 of the CA. It followed that the impugned sale and purchase transactions which were entered into within the period of two years prior to the presentation of the winding up petition against the first plaintiff are void.

[21] The Court of Appeal made, inter alia, the following findings, namely: **A**

(a) that the sale and purchase transactions with respect to the 12 shop lots had not been entered into bona fide;

(b) that the defendant, as the alleged purchaser, had not established that they had paid valuable considerations for the purchase; **B**

(c) that the execution of the 12 impugned SPAs were tainted by the conflicting interest of related personages behind the defendant and the directors of the first plaintiff at the time they were entered into;

(d) that the liquidator of the first plaintiff had brought the suit for the benefit of the general body of creditors and therefore had sufficient authority or locus to pursue the action together with the second plaintiff; and **C**

(e) that no error or misdirection by the learned judge in making an inference that there existed an underlying deceitful intent or motive behind the execution of the 12 SPAs. **D**

LEAVE TO APPEAL

[22] This court had granted the defendant leave to appeal on 12 February 2015 on the following question, namely: **E**

> whether the doctrine of fraudulent or undue preference applies to a relationship of Vendor and Purchaser or only confined to a relationship of Debtor and Creditor?

F

AT THE FEDERAL COURT

The relevant laws

[23] Before we deal with the facts, it will be convenient to state our view of the relevant law. The present appeal centered around three statutory provisions of law, namely s 293 of the CA, ss 52 and 53 of the BA. The applicable legal principles are only to be appreciated with a proper understanding of these provisions which so far as relevant, we shall reproduce in full: **G**

(a) s 293 of the CA reads: **H**

> 293 Undue preference
>
> (1) Any transfer, mortgage, delivery of goods, payments, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the company been wound up be void or voidable in like manner. **I**
>
> (2) For the purposes of this section a date which corresponds to the date of presentation of the bankruptcy petition in the case of an individual shall be:

(a) in the case of a winding up by the Court:

(i) the date of the presentation of the petition; or

(ii) where before the presentation of the petition a resolution has been passed by the company for voluntary winding up the date in which the resolution to wind up the company voluntarily, is passed, whichever is earlier; and

(b) In the case of a voluntary winding up the date on which the winding up is deemed by this Act to have commenced.

(3) Any transfer or assignment by a company of all its property to trustees of the benefit of all its creditors shall be void.

(b) s 52 of the BA reads:

52 Avoidance of voluntary settlement

(1) Any settlement of property, not being a settlement made before and in consideration of marriage or a settlement made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void against the Director General of Insolvency, and shall, if the settlor becomes bankrupt at any subsequent time within five years after the date of the settlement, be void against the Director General of Insolvency, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

(2) Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt, before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the Director General of Insolvency.

(3) For the purposes of this section 'settlement' includes any conveyance or transfer of property, bill, bond, note, security for money or covenant for the payment of money and any gift of money.

(4) For the purposes of this section a settlor who dies insolvent shall be deemed to have become bankrupt at the date of his death.

(c) s 53 of the BA reads:

53 Avoidance of preferences in certain cases

(1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered any person unable to pay his debts, as they become due, from his own money in favour of any Creditor or any person in trust for any Creditor shall be deemed to have given such Creditor a preference over other Creditors if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same and every such act shall be deemed fraudulent and void as against the official assignee.

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a Creditor of the bankrupt.

(3) For the purposes of this section 'creditor' includes a surety or Guarantor for the debt due to the Creditor.

[24] The issue relating to s 52 of the BA and s 53 of the BA was not fully ventilated by the trial judge at the High Court. In fact, as correctly said by the Court of Appeal 'the learned trial judge appeared not to have delved into the differences between ss 52 and 53 of the BA, nor did it appear that the court below had been indeed called to consider that point. Her Ladyship judge had approached the issue before the court under the broad head of whether there had arisen a situation of undue preference (or fraudulent preference) as Her Ladyship termed it'.

Section 293 of the CA

[25] Section 293 of the CA, under the marginal title of 'Undue Preference', talks, inter alia, about avoidance of transaction of any transfer, disposal or other act relating to property made by a company within 'the twilight period' in the run-up to winding up. As expressly provided in the section itself had the transaction 'been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the company been wound up, be void or voidable in like manner'.

[26] Thus, the clear effect of s 293 of the CA is that it incorporates the relevant statutory provisions of the Bankruptcy Act 1967, particularly ss 52 and 53, on avoiding preference transactions to be read together with it. In other words the rules relating to bankruptcy as to undue or fraudulent preference are to be applied to the winding up of a company by virtue of this section (see: *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449).

[27] Generally, the rule regarding undue preference under s 293 of the CA is

to prevent preferred 'transferee' (any person in the case of s 52 of the BA, or any creditor in the case of s 53 of the BA) from obtaining an unfair advantage over other creditors (in the event of the company being wound up) by concluding a transaction within the 'twilight period' before the commencement of the winding up proceedings (the term 'twilight period' for the purpose of s 52 of the BA refers, inter alia, to the period of '2 years' prior to the presentation of a bankruptcy petition, and for the purpose of s 53 of the BA, refers to the period of '6 months' prior to the presentation of a bankruptcy petition).

[28] The Court of Appeal had correctly distinguished the difference between the ambit of ss 52 and s 53 of the BA in the following words:

> To restate the distinction was this: section 52 BA was the applicable provision when the challenge was premised on the grounds that the disputed transaction was not entered bona fide and/or for valuable consideration. section 53 BA would only be relevant in a situation where the bankrupt (company) was already insolvent (unable to pay its debts) and the challenge was to invalidate certain disposals or payments effected to some creditors or beneficiaries, in preference to others or the general body of creditors.

[29] In *Ferrier and another v Civil Aviation Authority* (1994) 127 ALR 472 the Federal Court of Australia (General Division) cited the following passage from the House Committee Report No 95–595 [1977], pp 177–178 on the object or purpose of the preference provisions:

> The purpose of the preference section is two-fold. First, by permitting the trustee to avoid prebankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his side into bankruptcy. The protection thus afforded the debtor often enables him to work his way out of a difficult financial situation through cooperation with of his creditors. Secondly, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally. The operation of the preference section to deter 'the race of diligence' of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference section — that of equality of distribution.

(This passage was adopted by the Supreme Court of the United States of America in *Union Bank v Wales* [1991] 116 L Ed 2d 514).

[30] Section 293 of the CA does not stand alone. It must be read together with the relevant laws of bankruptcy, particularly ss 52 and/or 53 of the BA. So far as relevant to the facts of the present case, s 293 of the CA read together with s 52 of the BA has the effect that any transfer or conveyance of the property by the first plaintiff (comprising of the impugned 12 shop lots by way of the 12

SPAs) in favour of the defendant as a purchaser shall, if winding up petition against the first plaintiff has been commenced within two years after the date of the transfer or conveyance, be absolutely void against the liquidator of the first plaintiff unless the transfer or conveyance was made in good faith and for valuable consideration (in this case the date of the transfer via the 12 impugned SPAs is 19 September 2006 and the date of the commencement of the winding up of the first plaintiff is 18 December 2007).

Section 52 of the BA

[31] Section 52 of the BA talks about a settlement (which includes conveyance or transfer) of property, inter alia, to 'a purchaser good faith'. A 'purchaser' for the purpose of that section refers to any person or entity who purchases the property in good faith and for value able consideration, but need not necessarily be confined to a 'creditor'. *Halsbury's Laws of Malaysia*, Vol 6(2) (2012 Reissue) at p 171, paras 170–256 explained: 'the word 'purchaser' is to be construed in the ordinary commercial sense and means a person who has given value. In order to constitute a purchaser in good faith within the meaning of the Bankruptcy Act 1967, it is sufficient if the purchaser acts in good faith and it is not necessary that both parties to the transaction should so act' (see also: *Official Assignee v Ngu Ung Yong* [1988] 2 MLJ 264; *Hance v Harding* (1888) 20 QBD 732; and *Mackintosh v Pogose* [1895] 1 Ch 505).

[32] The words 'undue preference' as appeared in the title of the section in the context of s 293 of the CA read together with s 52 of the BA, as far as relevant to the facts of the present case, refer to an act of preference by a company which is in the run-up to be wound up during the twilight period of two years, in disposing or transferring its properties to any person or entity (though not bona fide purchaser) and without valuable consideration, the effect of which be detrimental to the interest of the general creditors (particularly unsecured creditors) in the process of liquidation in the event of it being wound up by court.

[33] A transfer or conveyance made during the twilight period either not in good faith or without valuable consideration is absolutely void as against the liquidator. If the liquidator is able to show that either valuable consideration or good faith on the part of the purchaser (in this case is the defendant) is lacking, he has discharged the onus of proving that the transfer or conveyance is void (see: *Re Anson Cycle & Motor Works, ex parte the official assignee* [1960] MLJ 171; *Official Assignee of the Estate of Cheah Soo Tuan v Khoo Saw Cheow* [1931] 2 MC 126; [1931] AC 67).

[34] The primary purpose of s 52 of the BA is that it was framed to prevent properties belonging to the person (in bankruptcy) or company (in winding

up) from being put into the hands of relatives or preferred parties during the twilight period to the disadvantage of creditors, in the event the person is declared bankrupt or the company is wound up later (see: *In re A Debtor, ex parte the official receiver* [1965] 1 WLR 1498; and *Barton v Official Receiver* (1986) 161 CLR 75). However as clearly stated by Chong Siew Fai J, in *Official Assignee v Ngu Ung Yong*:

> That may well be so. But each case must be considered in its own facts and circumtances, and whether a settlement of property in a case falls foul of the statutory provisions must necessarily depend on the facts and circumtances of that particular case.

[35] The onus is on the liquidator to establish on the balance of probabilities that the transfer or conveyance of the properties in question to the defendant by way of the 12 impugned SPAs were made either not in good faith or without valuable consideration passing from the defendant as the purchaser to the first plaintiff as the vendor. Once it is established, the onus now shifts to the defendant as the purchaser to adduce evidence to rebut the plaintiff's allegations. The onus of proof will have to determine the issue. When all the evidence introduced by the parties is considered, the party, upon whom the burden of proof rests has not discharged the burden, the decision must be against him (see: *Pickup v The Thames And Mersey Marine Insurance Company, Limited* (1878) 3 QBD 594; *Wakelin v London and South-Western Railway Company* (1887) 51 JP 404; and *Official Assignee v Ngu Ung Yong*.

Applying the laws to the present case

[36] Back to the present case before us, at the very outset of the hearing of the appeal it was clearly indicated that the plaintiffs' case rested on the provisions of s 293 of the CA read together with s 52 of the BA (but not s 53 of the BA) to determine the validity or otherwise of the 12 impugned SPAs. The bone of the plaintiffs' contention is that the transfer or conveyance of the shop lots by virtue of the 12 SPAs was not made in good faith nor for valuable consideration and that in the circumstance, they were absolutely void in view of the fact that the 12 SPAs were entered into within two years prior to the commencement of the winding up petition against the first plaintiff (in this case, the 12 SPAs and the conveyance were executed about one year and three months prior to the winding up petition, and as submitted, this fell within the twilight period of two years). The plaintiffs' case has never been based on s 53 of the BA right from the outset.

[37] As borne out in the judgment of the Court of Appeal, and upon perusal of the appeal records made available before us, we are convinced that the plaintiffs relied entirely on s 293 CA read together with s 52 of the BA. Paragraphs 23, 24, 26 and 27 of the judgment support our findings:

[23] The contention of counsel for the Gallant Acres and Kepong Development on the other hand was that s 293 of the CA ought to be read with s 52 of the BA to determine the validity or otherwise of the impugned 12 SPAs. The bone of contention of Gallant Acres and Kepong Development was that the 'settlement' (which by definition in s 52(3) of the BA included conveyance or transfer of property of the shops by virtue of the 12 SPAs) was not made in good faith or for valuable considerations and in that circumstance, they were absolutely void if the disputed transaction(s) was entered into within a period of two years prior to Gallant Acres being wound-up; here there was only a gap of about one year and three months between those two material dates and this fell well within the proscribed period.

[24] Upon perusal of the pleadings and records we were satisfied that the thrust of the case of the liquidator for Gallant Acres and Kepong Development, both at the High Court and before us, has always been that the sale and purchase transactions with respect to the 12 shops were not been entered into bona fide and, in any event, that Silver Corridor had not established that they had paid valuable consideration for the same. This, firstly, was could clearly borne out by what was pleaded by Gallant Acres and Kepong Development in their statement of claim, in particular paras 17, 23, 24(iv), (vii), (viii), (xix) to (xxxiv) thereof. Furthermore, the case for Gallant Acres and Kepong Development had all along been pursued on that premise, namely, that the transactions were devoid of valuable consideration and the execution of the 12 SPAs were tainted by the conflicted interest of related personages behind Silver Corridor and the directors of Gallant Acres at the time it was entered into.

...

[26] By seeking to read s 293 of the CA with s 53 of the BA only, counsel for Silver Corridor was attempting to restrict the so termed 'twilight period' to six months as opposed to a period of two years prior to the presentation of the winding up petition allowed under s 53 of the BA. This, in our view, was a desperate stance to confuse the real issues that was before the court.

[27] There was no room for dispute that what had been pleaded by Gallant Acres (through the liquidator) and Kepong Development in this action and which had been accordingly pursued at the trial was that the disputed transactions, namely the 12 SPAs had not been entered in good faith and nor were they supported by valuable consideration passing from Silver Corridor to Gallant Acres. This obviously meant that s 52 of the BA was the material provision to be invoked to be read with s 293 of the CA. It followed then that the transactions that could be called into question were those entered within two years prior to 18 December 2007.

[38] There are ample evidence, as adduced during trial, to support the findings that the 12 impugned SPAs in respect of the 12 shop lots had not been entered into bona fide and the defendant had failed to establish that they had paid valuable consideration for the same; and that s 52 of the BA (not s 53 BA) was the material provision to be invoked by the plaintiff to be read with s 293 of the CA. We agree with the Court of Appeal that the plaintiffs had discharged the burden of proof to establish a case under s 293 of the CA read together with

s 52 of the BA, and the 12 impugned SPAs were therefore void.

[39] We agree with the Court of Appeal that the 12 impugned SPAs were hastily drawn up at the behest of Lee Aik Cheong, the central figure in the whole transaction. He was an undischarged bankrupt at the material time who had total and effective control over both the first plaintiff (prior to the winding up) and the defendant through his family members. The transaction was not done at arm's length. It is not a bona fide arm's length commercial sale between a vendor and a purchaser. All the 12 SPAs were executed for the first plaintiff by Lee Tiam Lai, the uncle of Lee Aik Cheong, and Mdm Kok Siew Hwa for the defendant who was the wife of Lee Aik Cheong. The directors and shareholders of the first plaintiff and the directors and shareholders of the defendant were all within the same family and related to each other.

[40] There are other compelling unrebutted evidence to show that the transactions were not bone fide transactions. They are:

(a) the defendant as the purchaser claimed to have paid the full purchase price of RM1,440,000 for the 12 shop lots in question within 24 days upon execution of the 12 SPAs, although the shops were only approximately 45% completed; eventhough cl 14.1 of the SPAs stipulates that full payment was only to be paid in 36 months upon completion of the shops;

(b) instead of paying nine instalments as stipulated in the SPAs, the defendant made one lump sum payment in advance, prior to the development being completed or getting the vacant possession;

(c) the 12 SPAs were stamped the very next day upon execution. This is out of ordinary and not the norm to do in view of the fact that no deposits were paid or any payment made (at the date of the stamping);

(d) there was no credible evidence to show that any payment in respect of the shop lots were paid by the defendant to the first plaintiff; there was also no evidence to show that the payment (if any has been made) has been paid into a Housing Developer statutory account as required under r 4 of the Housing Developers (Housing Development Account) Regulations 1991 made pursuant to s 24 of the Housing Developers (Control and Licensing) Act 1966; and

(e) upon checking by the liquidator, it was found that the money was not in any of the first plaintiff's account. The liquidator was unable to locate the housing development account despite writing to Bank Negara Malaysia. The directors of the first plaintiff (who were family members and related to the directors and shareholders of the defendant) refused to cooperate and did not give evidence at trial in court. The defendant only called one witness ie the company secretary, who gave evidence that the first

plaintiff's Hong Leong Bank account was closed by the directors of the first plaintiff vide board resolution of 14 December 2007 on 14 December 2007, four days before the winding up petition was commenced in court. There was no explanation whatsoever forthcoming as to what happened to those monies in the Hong Leong Bank Account.

Non-calling of witnesses

[41] At the trial, the plaintiffs called their witnesses to give evidence to support their claim, that the 12 impugned SPAs were not executed bone fide and no valuable consideration passed from the defendant to the first plaintiff for the alleged purchase of the 12 shop lots. In short, the defendant was not a purchaser in good faith. The defendant, on the other side has to adduce evidence by calling its witnesses to rebut the plaintiff's allegations against them. Unfortunately, the defendant only called one witness ie Ms Tan Si Li ('DW1'), a formal witness, who was the company secretary of the defendant who had no personal knowledge pertaining to the transaction of the 12 shop lots. DW1 only confirmed that all the cheques (issued by the defendant) were cleared for payments. Surprisingly, the liquidator upon perusal of the first plaintiff's records found no evidence to show that the payment was paid into any of the first plaintiff's account.

[42] In their evidence, through their witnesses who testified in court, the plaintiffs vigorously, challenged the character and relationship of Lee Aik Cheong with Lee Hing Lee (brother of Lee Aik Cheong), Lee Yek Hui (son of Lee Aik Cheong), Lee Tiam Lai (uncle of Lee Aik Cheong), Lee Aik Seng (brother of Lee Aik Cheong), Mdm Kok Siew Hwa (wife of Lee Aik Cheong), Mdm Liew Fatt (mother of Lee Aik Cheong) and Lee Kok Meng (son of Lee Aik Cheong), (all expressly pleaded in the statement of claim). None of these persons appeared in court to testify for the defendant. There was no indication that they could not be traced.

[43] The law on this issue is clear and well settled. In *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2)* [2010] 2 MLJ 181; [2010] 1 CLJ 381 the Federal Court held as follows:

> Two consequences followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. Firstly, the evidence given by the appellant ought to have been presumed to be true. The judge was under a duty to accept the appellant's evidence as true in the absence of any evidence from the first respondent going the other way. His failure to direct himself in this fashion thereby occasioned a serious miscarriage of justice. Secondly, the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. The trial judge in the present case ought to have held that the failure of the first

respondent to give evidence apart from discrediting her case strengthened the appellant's case on those vital points that lay at the axis of the dispute between the parties. Instead, he treated the first respondent's failure to appear and give evidence as a matter of no apparent consequence. His non-direction upon such a crucial point amounted to a misdirection which occasioned a miscarriage of justice.

(See also: *Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2012] 5 MLJ 319; *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33; [1991] 1 CLJ 9; and *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509*).*

[44] In light of the above authorities, the courts below were correct in finding that there was practically no evidence whatsoever led by the defendant to rebut the overwhelming evidence of the plaintiffs. The defendant provided no reason as to why it did not care to call its witnesses and to adduce evidence, therefore the court will normally draw an adverse inference against the defendant. To borrow the words of Peh Swee Chin FCJ in *Jaafar bin Shaari* case, 'they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it'. In the circumstance, the trial court (as well as the Court of Appeal) has no power to hold that the other party (the plaintiffs in the present case) has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true (per: Elphinstone CJ in *Wasakah Singh v Bachan Singh* [1931] 1 MC 125 at p 128).

[45] In the light of the foregoing observation, it is therefore beyond doubt that based on the unrebutted and unchallenged evidence of the plaintiffs adduced during trial, the Court of Appeal was perfectly correct in coming to its conclusion that the plaintiffs had succeeded in establishing their case against the defendant based on the following findings, namely:

(a) that the transactions (through the 12 impugned SPAs) relate to the properties of the first plaintiff;

(b) that the first plaintiff was the purported vendor and the defendant was the purported purchaser of all the properties in question;

(c) that the transactions were entered into within the twilight period of two years prior to the commencement of winding up petition against the first plaintiff;

(d) that the transactions were done not in good faith and not at arm's length in ordinary commercial transaction;

(e) that no valuable consideration passed from the defendant as the purchaser to the first plaintiff as the vendor; and

(f) that the transactions clearly fall under the scope of s 293 of the CA read together with s 52 of the BA, and therefore void against the liquidator of the first plaintiff.

[46] We fully agree with the above findings. We find no reason to disturb such findings.

Section of the 53 BA

[47] We now turn to the provision of s 53 of the BA.

[48] The defendant's submissions before us (as well as before the Court of Appeal) appeared to rely on the provision of se 53 of the BA. The defendant contended that there is no question of undue or fraudulent preference in the present case in that the defendant has never stood as a creditor of the first plaintiff. Further, the defendant contended that it was not proved at the trial that the first plaintiff was already insolvent at the time the 12 SPAs were entered into.

[49] At the Court of Appeal, the defendant argued that in this case, s 293 of the CA has to be read with s 53 of the BA. According to the defendant, if at all the transactions were to tantamount to undue preference, it was argued that since there had been a lapse of more than six months (the twilight period) between the dates of the 12 SPAs were entered into and the first plaintiff being wound up, the transactions were not caught by the prohibition under s 53 of the BA and the action taken by the liquidator of the first plaintiff should fall.

[50] Section 53 of the BA deals with an act of a bankrupt (or a company) who is unable to pay his debts as they become due, inter alia, making conveyance or transfer of property or making any payment in favour of any unsecured creditor in preference over other unsecured creditors within the twilight period of six months prior to the presentation of a bankruptcy (or winding up) petition against the bankrupt (or company). Such transaction is deemed to be fraudulent preference and void as against the liquidator.

[51] As stated earlier, s 53 of the BA would only be relevant and applicable in a situation where the bankrupt (or company) was already insolvent (unable to pay its debt from its own money) and the challenge was to invalidate certain conveyance or disposal or payment effected to some selected or preferred unsecured creditors in preference to others or the general body creditors. In short, s 53 of the BA must be construed in its proper context, which is to

invalidate attempts at 'fraudulent preference' (see: *Tee Siew Kai (as the liquidator for Kumpulan Kerjaya Bhd (the receiver and manager appointed)) (in liquidation) v Affin Bank (formerly known as BSN Commercial Bank (M) Bhd) & Anor* [2011] 4 MLJ 491; [2011] 1 LNS 18). The relationship of 'creditor-debtor' is the key consideration under s 53 of the BA. The object is to prevent a particular creditor (particularly unsecured creditor) from obtaining for himself an unfair advantage at the expense of the other creditors by concluding a transaction with the company during the twilight period of six months preceding the commencement of the winding up proceedings against the company.

[52] This court in *Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (in liquidation)* [1998] 4 MLJ 569; [1998] 4 CLJ 557 had highlighted that 'The law relating to fraudulent preferences is set out in s 53 of the Bankruptcy Act, which is made applicable to companies by s 293 of the Companies Act, and is designed to preserve the sanctity of the pari passu principle by which creditors in a winding up share rateably in the assets available for distribution' (see also: *Lian Keow*).

[53] In the same case (*Sime Diamond*), this court has laid down the rules in relation to s 53 of the BA as follows:

> To take the matter further, it is clear law that the court has no power to make an order setting aside payments and transfers made in the run-up to bankruptcy in favour of a particular creditor which were designed to prefer him over other creditors unless the following five conditions are satisfied:
>
> (1) that the transaction in question took place within six months prior to the commencement of winding up;
>
> (2) that it satisfies the description of one of the types of transaction mentioned in s 53(1) of Bankruptcy Act;
>
> (3) that it took place at a time when the company was insolvent;
>
> (4) that the person in whose favour the transaction was effected stood in the relation of creditor to the company; and
>
> (5) the effect of the transaction was to confer on that person a preference, priority or advantage over other creditors in the winding-up.

[54] We are in agreement with the Court of Appeal, that the provision of s 53 of the BA does not apply to the facts of the present case before us. Clearly condition four of the above rules: that the person in whose favour the transaction was effected (the defendant in the present case) stood in relation of creditor to the company (the first plaintiff in the present case) has not been fulfilled. There was also no evidence to show that the first plaintiff was insolvent at the time when the transaction took place.

[55] Apparently, the defendant tried to bring in s 53 of the BA with the hope of enjoying the benefit of a shorter twilight period of six months as stipulated in the section and argued that the transactions in question were not caught by the prohibition under the section and were valid. Unfortunately, the defendant failed to realise that the actual attack launched by the plaintiff against all the 12 SPAs was not under s 53 of the BA, but under s 52 of the BA read together with s 293 of the CA, on the ground that they were entered into not in good faith and that no valuable consideration passed from the defendant to the first plaintiff.

[56] As correctly ruled by the Court of Appeal, the real issue at the trial was that the 12 impugned SPAs had not been entered in good faith and not supported by valuable consideration; and therefore it is obvious that s 52 of the BA (not s 53 of the BA) was the material provision to be invoked to be read with s 293 CA; and it followed that the transactions that could be called into question were those entered within two years prior the commencement of the winding up petition on 18 December 2007. At para [26] of the judgment, the Court of Appeal aptly commented that:

> 26. By seeking to read s 293 of the CA with s 53 of the BA only, Counsel for Silver Corridor was attempting to restrict the so termed 'twilight period' to six months as opposed to a period of two years (prior to the presentation of the winding up petition allowed under s 52 of the BA). This, in our view, was a desperate stance to confuse the real issues that was before the court.

Estoppel

[57] The issue of estoppel was also raised by the defendant. The defendant argued that the first plaintiff had accepted the defendant's payment of the full purchase price for all the 12 shop lots and never evinced any intention to refund the same. By that conduct, the defendant claimed that the first plaintiff was estopped from relying on s 293 of the CA as an instrument of fraud to prevent the defendant from receiving the properties which it had paid for.

[58] Our view is that the plaintiffs' claim is based on statutory provisions of s 293 of the CA read together with s 52 of the BA. These statutory provisions, as we have discussed earlier, are clear and unambiguous. Estoppel, being an equitable principle cannot operate to defeat clear statutory provisions of law. This settled principle of law was adopted by Edgar Joseph Jr in *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352b when His Lordship ruled that: 'The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute, ... particularly when the non-compliance goes to the root of the thing'.

[59] At p 356 of the judgment, His Lordship went on to say:

A In other words, if the terms of a statute are absolute and do not admit of any relaxation or exemption, anything done in contravention thereof, will be ultra vires and no person can be estopped from putting forward the contention that what was done was illegal or void: *University of Delhi v Ashok Kumar Chopra.*

B (See also: *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 30 MLJ 49; *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610; and *Southend-on-Sea Corpn v Hodgson (Wickford) Ltd* [1962] 1 QB 416).

Unjust enrichment

C

[60] The issue of unjust enrichment was also raised by the defendant. The defendant submitted that the trial judge erred in making the declaratory orders in favour of the plaintiffs which unjustly enriched the first plaintiff at the D expense of the defendant. This submission by the defendant rests on the assumption that the defendant has paid for the purchase price of the 12 shop lots to the first plaintiff. However, the evidence adduced by the plaintiffs (which were not challenged nor rebutted by the defendant at trial) says otherwise. There is not even a single-line of evidence adduced by the defendant E to show that the purchase price for the shop lots has been paid by the defendant as the purchaser. There is also no evidence to show that the purchase price was received by the first plaintiff and no evidence to show that the purchase price was paid into the statutory account as required under s 7 of the Housing Developers (Control and Licensing) Act 1966. Therefore, the issue of unjust F enrichment as raised by the defendant must fall.

CONCLUSION

[61] For the reasons abovestated, we are entirely in agreement with the G Court of Appeal that the plaintiffs had succeeded in establishing their claim against the defendant under s 293 of the CA read together with s 52 of the BA on the ground that the 12 impugned SPAs in question were not entered into in good faith and that no valuable consideration passed from the defendant to the first plaintiff in respect of the purchase of the 12 shop lots. We are also in H agreement with the Court of Appeal that s 52 of the BA was the material provision to be invoked to be read with s 293 of the CA; and s 53 of the BA was immaterial and not applicable to the facts and circumstance of the present case. The unrebutted and unchallenged evidence adduced by the plaintiffs at the trial clearly support the above findings.

I

[62] The question posed before us in the present appeal relates to the doctrine of 'fraudulent preference'. As stated above, the issue of 'fraudulent preference' relates exclusively to s 53 of the BA (not s 52 of the BA). Section 53 of the BA is immaterial and not applicable to the present case. The answer to

the question, does not decide the appeal one way or the other. We have dealt with the relevant issues at great length in the body of this judgement. We therefore find no necessity to specifically answer the said question.

[63] In the upshot, we dismissed the appeal with costs. We accordingly affirm the decisions of the courts below.

Appeal dismissed with costs.

Reported by Kohila Nesan